Office - Supreme Court, U.S.
FILED
FEB 12 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1033

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM H. PFLAUMER,
Respondent.

On Petition for Writ of
Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Donald J. Goldberg
(counsel of record)
1310 Three Girard Plaza
Philadelphia, PA 19102
Telephone:
(215) 563-6345

Joseph A. Tate
Stephen D. Brown
Ronald P. Schiller
SCHNADER, HARRISON,
SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, PA 19103
Telephone:
(215) 751-2048
Attorneys for
Respondent

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Should this Court Review a Decision of the Third Circuit Granting a New Trial on Each of Two Separate, Independent and Adequate Grounds Where the Petitioner Has Only Sought Review of One of Those Grounds?

2. Should this Court Review the Court of Appeals' Application of Well-Settled Law from *United States v. Agurs* to the Government's Deliberate Failure to Supply Material Information Regarding a Crucial Witness in Response to Respondent's Specific Pretrial Request?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT	3
ARGUMENT	10
I. CERTIORARI SHOULD NOT BE GRANTED WHERE REVIEW IS SOUGHT OF ONLY ONE OF TWO SEPARATE AND INDEPENDENT BASES FOR REVERSAL ON ALL COUNTS	10
II. THE COURT OF APPEALS APPLIED WELL-SETTLED LAW IN CONCLUDING THAT *UNITED STATES v. AGURS* REQUIRED A NEW TRIAL WHERE THE GOVERNMENT DELIBERATELY FAILED TO DISCLOSE AN IMMUNITY AGREEMENT WITH A CRUCIAL GOVERNMENT WITNESS IN RESPONSE TO A SPECIFIC PRETRIAL REQUEST	15
CONCLUSION	22

TABLE OF AUTHORITIES

Cases: Page

Bagley v. Lumpkin, 719 F.2d 1462 (9th Cir. 1983), *cert. granted sub nom. United States v. Bagley*, ____U.S. ____, 105 S. Ct. 427 (1984) (No. 48, 1984 Term) 18, 21, 22

Brady v. Maryland, 373 U.S. 83 (1963)..... 20

Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980) 18

King v. Ponte, 717 F.2d 635 (1st Cir. 1983).... 18, 20

Monroe v. Blackburn, 607 F.2d 148 (5th Cir. 1979), *cert. denied*, 446 U.S. 957 (1980)..... 18

Oster v. United States, 577 F.2d 782 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)..... 18

United States v. Agurs, 427 U.S. 97 (1976). 2, 10, 15, 16, 19

United States v. DiCarlo, 575 F.2d 952 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978)..... 18

United States v. Farid, 733 F.2d 1318 (8th Cir. 1984) 18

United States v. Goldberg, 582 F.2d 483 (9th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979) 18

United States v. McCrane, 527 F.2d 906 (3d Cir. 1975), *vacated*, 427 U.S. 909 (1976)..... 17

United States v. McCrane, 547 F.2d 204 (3d Cir. 1976) 15, 17

United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984), *petition for cert. filed sub nom. United States v. Pflaumer*, (U.S., December 28, 1984) (No. 84-1033)..... 3

Ziegler v. Callahan, 659 F.2d 254 (1st Cir. 1981) . 18

TABLE OF AUTHORITIES—*(Continued)*

Cases:	Page
18 U.S.C. §371	3
18 U.S.C. §1341	3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1033

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM H. PFLAUMER,

Respondent.

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

INTRODUCTION

The government's petition asks this Court to review only one issue in a decision of the United States Court of Appeals for the Third Circuit which granted respondent a new trial on each of two separate and distinct grounds. As a consequence, this case must be retried regardless of whether or not this Court grants the petition for certiorari.

The two separate grounds for the Third Circuit's decision were: 1) the government's deliberate failure to disclose important exculpatory evidence in response to a specific pretrial request by respondent, and 2) the dis-

trict court's failure to charge the jury, as specifically requested by respondent, that to convict respondent of mail fraud or conspiracy to commit mail fraud, it must first find that he became a party to the mail fraud scheme or a member of the alleged conspiracy prior to the last mailing. Petitioner has not asked for review of the second ground. Instead, the government contends, in a footnote, that the second ground reversed only the conspiracy count, leaving untouched the 21 substantive mail fraud convictions. In so arguing, however, the government reverses positions earlier taken and totally misconstrues the record and the holding below which reversed respondent's entire conviction because of the jury instruction error. If for no other reason, this petition should be denied simply because the opinion of the court of appeals contains an independent basis for reversal as to which the government does not seek review.

The government does seek review of that part of the Third Circuit's decision which was based upon *United States v. Agurs*, 427 U.S. 97 (1976). But here the court of appeals merely applied well-settled law in evaluating the prosecutor's deliberate refusal to disclose specifically requested information, and followed explicitly the standard set forth in *United States v. McCrane*, 547 F.2d 204, 206-08 (3d Cir. 1976) (as remanded for reconsideration in light of *United States v. Agurs*). The court of appeals simply tracked *Agurs* in concluding that in a close case government suppression of an immunity agreement with a crucial government witness in response to a specific request for any such agreements violated due process and required a new trial. There is no conflict in the courts of appeals regarding application of *Agurs* in such circumstances, and the discussion below did not create any. Therefore, even if the new trial order was based solely upon this issue, the petition should be denied.

STATEMENT

A. Procedural Background

The indictment charged William H. Pflaumer, Charles Gillan, Harold Oxman and Raymond Hill with 21 counts of mail fraud, 18 U.S.C. §1341, committed by means of falsified diesel fuel invoices intended to defraud the states of Pennsylvania, New Jersey and Maryland of diesel fuel excise taxes due from Wm. H.P., Inc., ("Wm. H.P."), a trucking company owned by Mr. Pflaumer. The 21 mailings listed in the first 21 counts of the indictment began in April, 1978 and ended in June, 1979. Count 22 of the indictment charged that from November, 1976, to January 31, 1981 the same four defendants plus John Luciano entered into a conspiracy in violation of 18 U.S.C. §371 to commit mail fraud as described in the first 21 counts. Frank Jock was a named but not indicted participant in all 22 counts of the indictment.

Luciano pleaded guilty to the conspiracy count and testified as a government witness. Gillan pleaded guilty to all counts, but did not testify. The jury found Mr. Hill not guilty and Messrs. Pflaumer and Oxman guilty on all counts.

Respondent filed motions for a new trial which were denied by the district court (Weiner, J.). The district court was reversed by the Court of Appeals for the Third Circuit in *United States v. Oxman*, 740 F.2d 1298 (3d Cir. 1984).

B. Trial

Following the indictment counsel for respondent, by written request, specifically asked the government to inform him of (1) any agreements, understandings or other promises made between the government and its wit-

nesses, whether they related to this case or any other case or investigation, and (2) of all evidence of criminality on the part of any witness for the government. The discovery letter instructed the government, where disclosure was declined, to state whether the government has information or materials responsive to the declined request, so the district judge could resolve the issue.

The government responded by letter stating that (1) Messrs. Jock and Luciano were the only government witnesses with whom it had any agreement at all in any cases or investigations and (2) Jock and Luciano were the only government witnesses known by the government to have engaged in any criminal conduct.

Prior to trial, the court specifically ordered the government to turn over to the defense all *Brady* material. During the trial — when other information which should have been turned over came out on cross-examination — the court asked whether there was any more undisclosed *Brady* material, and was assured by government counsel that there was no more.

In spite of these assurances and notwithstanding repeated requests by the district court judge and the written request by respondent, the only material respondent ever received from the government with respect to its witness Ralph Wille was notes of an interview with Mr. Wille, which make no mention of any immunity agreement or any Wille exposure to criminal prosecution in connection with another matter. Indeed, the statement creates the impression that Mr. Wille was simply an innocent bystander witness, voluntarily cooperating with the government. Mr. Wille was a crucial government witness at trial.

After the trial was over, the defense learned for the first time that Ralph P. Wille (1) had himself engaged in serious criminal conduct and was the subject of an ongoing federal grand jury investigation, (2) had secured a use-immunity agreement from government counsel for his testimony with regard to his own activities while at

the trucking company and those of Gillan and Pflaumer during the period about which he testified at trial, and (3) was still subject to the possibility of federal criminal prosecution when he testified at trial.[1]

---

1. Counsel for Pflaumer learned for the first time after trial that:
   a. Wille was the architect of a $500,000 to $600,000 check-kiting scheme involving various bank officials (Exhibit P-2 at 35 and Exhibit P-3 at 39, from Hearing of July 5, 1983), which was the subject of an ongoing federal Grand Jury investigation (A-1646 to 1647) (all citations to the Appendix submitted in the court of appeals begin with "A-").
   b. Government counsel originally sought a guilty plea from Wille in connection with that check-kiting scheme (A-1631);
   c. Defendant Pflaumer's name figured prominently among those under investigation in connection with the check-kiting scheme and it was clear to Wille that if he could supply incriminating information as to Pflaumer to the government, that Wille would get immunity for any criminal exposure that he had (A-1632);
   d. On September 26, 1980, a use-immunity agreement (A-1529) was entered into between the government and Ralph P. Wille providing Wille full use-immunity for any information and testimony provided by him "relative to the federal investigation into certain activities of Charles Gillan and others during the period between June 2, 1978 and December, 1979."
   e. It was clear from the beginning of the investigation and at the time the use-immunity letter was drawn that defendant Pflaumer was one of the "others" referred to in the letter agreement (A-1634);
   f. By the terms of the Wille immunity agreement, the information and testimony provided by Wille could nevertheless be "used against him in the event the Government chooses to proceed criminally against him" if:
      1. Wille does not provide "complete cooperation and testimony at any hearings and/or trials"; or
      2. "...the totality of circumstances convinces the Government that (Wille's) statement is not complete and truthful..."; or
      3. The government discovers that Wille received any benefit from the activities under investigation other than

Existence of the scheme charged was merely background at trial. Counsel for Mr. Pflaumer acknowledged in his opening statement that the scheme existed and operated as alleged in the indictment and that the state taxes said to have been evaded — approximately $40,000 to $50,000 a year — were evaded. Pflaumer's defense was that he simply did not know of the scheme and that he had turned over the operation of the trucking company to Gillan.

Pflaumer promised to show that: 1) Frank Jock, the only witness who directly implicated him in the tax scheme, was not to be believed, and that Jock was able to get himself out of a long jail term by giving the government a case against Pflaumer, and 2) Pflaumer was unaware of how his trucking company's diesel fuel purchases and use were being reported to the states concerned, and that throughout the indictment period he was an almost absentee owner who had turned over such matters and most others concerning the trucking company to Charles Gillan, who became President of Wm. H.P. when Pflaumer purchased and began to operate the Philadelphia brewery C. Schmidt & Sons, Inc. ("Schmidt's") in April, 1976.

The government's case against Pflaumer broke down into two time frames: 1) pre-June, 1979 or before the last mailing alleged in the indictment to form the basis for the mail fraud counts; and 2) post-June, 1979 — evidence relating primarily to contacts with Pflaumer during the first tax audits by state auditors. These con-

---

NOTES *(Continued)*

salary and reasonable and customary benefits related to his employment (A-1529 to 1531);

g. At the time Wille testified in this case, the grand jury investigation of the check-kiting scheme remained an open and ongoing grand jury investigation, wherein Wille was still subject to the possibility of prosecution. (A-1646 to 1647).

tacts were after the last mailing alleged in the indictment and were admissible only to show awareness of the acts occurring before the last mailing.

Thus, there were two critical issues at trial: what did Pflaumer know and, if he did know about the scheme, when did he first learn of it. It was respondent's position throughout the trial that, since the conspiracy as charged was over with the last mailing, if the jury found Pflaumer only learned of the scheme after the last mailing and during the fuel audits, he must be acquitted of all charges.

Only one witness provided significant evidence establishing Mr. Pflaumer's involvement in the scheme before the last mailing in June, 1979. Frank Jock testified that he attended a single meeting at which the scheme was approved by Pflaumer in late 1976. The government conceded that Jock was incredible and invited the jury to look elsewhere for corroboration.[2]

The government sought to corroborate Jock's testimony (and undermine Pflaumer's defense as articulated in Pflaumer's opening) by offering evidence of Pflaumer's daily involvement in the affairs of Wm. H.P. so that the jury might infer that Pflaumer must have known of the openly-operated scheme. Although a number of Wm. H.P. employees testified during the trial, Wille was the only one who testified that Pflaumer was

2. The court of appeals concluded that the government's skepticism was well-founded for cross-examination established

> "that the prosecution had orchestrated Jock's transfer to Eglin Prison Camp, a minimum security prison-characterized by Jock as a 'country club',... — obtained a reduction in sentence making Jock eligible for parole immediately,..., and recommended favorable treatment from the Parole Board, which Jock received....As a consequence, Jock — who at that time served only five months of a four year prison term for wire fraud — was released on parole after only three additional months' incarceration, two of which were served at a 'half-way house in Palm Beach'.... The import of Jock's cross-examination was that the government had paid dearly for his testimony." (37a).

significantly involved in the affairs of the trucking company. Contrary to Pflaumer's position, "[t]he government [through Wille] established that Wm. H.P. issued no checks without Pflaumer's approval and that Pflaumer conferred several times daily with the Wm. H.P. office manager. In contrast, Pflaumer's defense was that Gillan and Hill ran Wm. H.P. while he spent most of his time at the brewery and had little involvement in the day to day financial affairs of Wm. H.P." (38a).

Furthermore, the government established through Wille that there appeared to be no secret at the trucking company about the excise tax scheme. In short, Wille was the only witness to cut directly through Pflaumer's defense that Pflaumer was an almost absentee owner of the trucking company who left its daily affairs to others and knew nothing of the tax scheme.

The fact that Wille was presented as an innocent, former employee of the trucking company, with no animosity towards Pflaumer and no reason or motive for testifying as he did, made his testimony more credible — particularly when contrasted to the testimony of John Luciano and Jock who bought their freedom through their testimony against Pflaumer. If the Wille agreement had not been suppressed, Wille would have been seen for what he was, another prosecution witness working his way to freedom by implicating Pflaumer.

A second part of the proof presented against Pflaumer consisted of the testimony of fuel tax auditors from Pennsylvania, New Jersey and Maryland. Each of the audits described took place after the last mailing (June 30, 1979). The auditors testified that in response to a request made to respondent for all fuel invoices, they received only a fraction of the invoices he produced later in response to a federal grand jury subpoena. From this, the prosecutor argued that Pflaumer was aware of the fuel tax scheme and tried to cover it up by hiding the mismarked invoices. This evidence was admissible only to show consciousness of guilt, and not participation in

an ongoing crime, for the crimes charged had already been committed.

To ensure that the jury focused on the two questions necessary to determine whether Pflaumer was guilty or not guilty — what did he know and when did he know it — counsel for Pflaumer requested the judge to charge the jury as follows:

> "The indictment charges that the last tax return mailed as part of the alleged scheme and conspiracy was dated June 30, 1979. It was at that time that the illicit objectives of the alleged conspiracy or scheme terminated. You may not find any defendant guilty merely on the basis of anything he did or said after June, 1979. This is because a conspirator cannot join a conspiracy or scheme after its attempts to achieve illicit objectives has ended....You have heard testimony of state auditors about their dealings with Mr. Pflaumer's companies after June, 1979. If you find that Mr. Pflaumer only became aware of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes at the time of these audits, *you must acquit Mr. Pflaumer of all charges*. In short, if you find that the Government has not proven beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, *you must acquit Mr. Pflaumer of all charges*." (11a) (emphasis added).

The district court rejected defendant's request to so charge.

C. The Third Circuit's Opinion

The Court of Appeals for the Third Circuit reversed Pflaumer's conviction on two grounds. First, the court of appeals concluded that the district court had erred in re-

fusing to instruct the jury that it must find Pflaumer was a party to the alleged mail fraud scheme and conspiracy before the last mailing in June, 1979. (11a-17a). The court also reversed his conviction because the prosecution's deliberate failure to disclose the Wille agreement violated *United States v. Agurs* and, given the importance of Wille's testimony, the suppression was not harmless beyond a reasonable doubt. (17a-46a).

The government asked the Third Circuit for rehearing en banc on both grounds. In its petition, the government argued that the panel had erred in concluding that the error on the jury instruction issue required reversal of all counts. The Third Circuit denied the petition for rehearing en banc.

In its petition for certiorari, the government has restricted its request for review to the *Agurs* issue.

ARGUMENT

The petition for a writ of certiorari does not present any issue warranting review by this Court.

I. CERTIORARI SHOULD NOT BE GRANTED WHERE REVIEW IS SOUGHT OF ONLY ONE OF TWO SEPARATE AND INDEPENDENT BASES FOR REVERSAL ON ALL COUNTS.

This case must be retried on all counts regardless of how this Court rules on the *Agurs* issue. The court of appeals found that the district court erred in refusing to instruct the jury as requested by respondent on the termination of the mail fraud scheme and the conspiracy. This reversal covered all counts. Petitioner has not sought review of the court of appeals' opinion on the jury instruction issue. (Pet. 5-6 n.2) Instead, petitioner has reversed the tack taken in its petition for rehearing before the court of appeals that the 21 substantive courts should not have been reversed because of the error in the charge, arguing now that the decision below only re-

versed the conspiracy count and not the 21 substantive counts. (Pet. 6 n.2). Petitioner is wrong.

a. First, the government ignores the plain language of the requested instruction. The instruction required the jury to find respondent not guilty on all charges unless it found beyond a reasonable doubt that he was a party to the mail fraud scheme or the conspiracy before the last mailing in June, 1979. The instruction provides in part:

> "You have heard testimony of state auditors about their dealings with Mr. Pflaumer's companies after June, 1979. If you find that Mr. Pflaumer only became aware of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes at the time of these audits, you must acquit Mr. Pflaumer of *all charges*. In short, if you find the Government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, you must acquit Mr. Pflaumer of *all charges*." (A-1498) (emphasis added).

Thus, the requested charge related to all counts -- not simply the conspiracy.

If the court of appeals believed that the requested instruction misstated the law because it applied to all counts, it would have affirmed the district court's refusal to give the requested instruction. In fact, the government argued in the court of appeals that the requested instruction misstated the law since it "confuses the termination point of a substantive mail fraud count and a conspiracy to defraud and makes no attempt to distinguish between the two." Brief for the United States at 49. The court of appeals rejected this argument.

b. The government has also argued that the court of appeals' reversal covered only the conspiracy count be-

cause the district court failed to give the jury "an instruction permitting it to hold respondent vicariously liable for the substantive offenses committed by his co-conspirators." (Pet. 6 n.2). This argument ignores the record, as well as the government's own contentions.

First, the failure to give the requested instruction infected the entire conviction since the district court charged the jury time and again that a conspirator was liable for each and every act of his other co-conspirators done in furtherance of their joint goal regardless of when he joined the conspiracy. The district court charged as follows:

> "So, a conspiracy is a kind of 'partnership in criminal purposes' in which each member becomes the agent of every other member. (A-1460)
>
> * * *
>
> "One who willfully joins an existing conspiracy is charged with the *same responsibility as if he had been one of the originators or instigators of the conspiracy*. . . .
>
> Even if one joined the conspiracy after it was formed and was engaged in it to a degree more limited than that of other co-conspirators, he is equally culpable so long as he was a co-conspirator.
>
> In other words, it is not required that a person be a member of the conspiracy from its very start. He may join at any point during its progress, and *he may be held responsible for all that has been done before he joins. . . . [B]y becoming a partner he assumes all the liabilities of the partnership including those occurred [sic] before he became a member.*" (A-1464) (emphasis added).
>
> * * *
>
> "The question is: Did the particular defendant

join the others with awareness of at least some of the basic purposes and aims of the conspiracy? *If so, then he adopts as his own the past and future acts of all of the other conspirators.*" (A-1466) (emphasis added).

* * *

"When people enter into a conspiracy to accomplish an unlawful end, they become agents for one another [sic] in carrying out the conspiracy. Hence, *the acts* or declarations *of one co-conspirator* in the course of a conspiracy and in furtherance of the common purpose *are deemed to be the acts of all, and all are responsible for such acts.*" (A-1468 to 1469) (emphasis added).

The government's argument ignores entirely the above quoted portions of the charge, where the court repeatedly instructed the jury that one who joins a conspiracy "at any point" after its inception adopts and is responsible for all the acts of his co-conspirators committed before he joined.

Simply put, the judge's charge permitted the jury to convict respondent of conspiracy merely because he engaged in a post-conspiracy cover-up after learning of the fuel tax scheme, and convict him of the substantive counts because, as a member of the conspiracy, he adopted as his own and was responsible for all the past acts of his fellow co-conspirators.

c. The government's position is surprising, given its argument in the court of appeals where it argued that Pflaumer could join the conspiracy after June, 1979 and thereby become responsible for all the prior mailings. The government argued in the court of appeals:

"Pflaumer's actions in concealing fuel tax invoices from state auditors and requesting that Jock destroy invoices were alone sufficient to bring him within the conspiracy and to constitute a ratification of the

> co-conspirator's antecedent conduct including any mailings made in furtherance of this scheme." (Brief of the United States at 50).

Thus, the government's own brief recognized the exact concern expressed in respondent's requested jury instruction.

In addition, the government's present interpretation of the panel's opinion is contrary to its own argument in its Petition for Rehearing with Suggestion for Rehearing En Banc. The government there argued that the panel erred in concluding that the error on the jury instruction issue required a new trial on all counts. *See* Petition for Rehearing with Suggestion for Rehearing En Banc at 14-15. In its petition, the government phrased one of the issues presented as:

> "Whether a conspiracy to commit mail fraud necessarily terminates, as a matter of law, on the date of the last mailing and, if so, whether the failure to instruct the jury requires not only a reversal of the conspiracy count but 21 substantive counts not resting on a vicarious liability theory." (*Id.* at 1).

d. Moreover, the government simply cannot be correct that on the facts of this case the court of appeals' reversal related solely to the conspiracy count. If the jury properly found that Pflaumer was guilty of the mail fraud counts, charging mailings on or before June, 1979, it necessarily found that he joined the conspiracy before the last mailing in June, 1979, and the failure to give the requested instruction would have been harmless error. But, the court of appeals did not so find, nor is the language of its reversal ambiguous:

> "We conclude that Oxman's conviction must be affirmed, but that in Pflaumer's case an erroneous charge and the deliberate nondisclosure of evidence favorable to the defense require a new trial." (2a).

* * *

> "Because the trial court erred in rejecting Pflaumer's request for a charge that the jury must find that he joined the conspiracy prior to the last mailing, and because the governments withheld specifically requested *Brady* material, his conviction must be reversed, and the case remanded for a new trial." (46a).

Indeed, the court of appeals has no difficulty limiting the scope of its reversal to a particular count or counts (rather than the entire conviction) when that is its intent. *See, e.g., United States v. McCrane*, 547 F.2d 204, 208 (3d Cir. 1976).

In sum, the court of appeals' reversal on the jury instruction ground covers all counts. It was clear in the requested instruction; it was clear on the facts of the case; it was clear to the government when it argued to the court of appeals; and it is clear from the language of the opinion itself.

In the presence of an independent basis for reversal on all counts, it would serve little purpose for the Court to grant the petition for certiorari.

II. THE COURT OF APPEALS APPLIED WELL-SETTLED LAW IN CONCLUDING THAT *UNITED STATES v. AGURS* REQUIRED A NEW TRIAL WHERE THE GOVERNMENT DELIBERATELY FAILED TO DISCLOSE AN IMMUNITY AGREEMENT WITH A CRUCIAL GOVERNMENT WITNESS.

The court of appeals was following well-settled law set down in *United States v. Agurs*, *supra*, and in the Third Circuit in *United States v. McCrane*, *supra*, in granting a new trial on the suppression issue. The government's petition characterizes the court of appeals' analysis as "complicated" and "unsound." (Pet. 8-9). Yet,

the court of appeals' reasoning is simple, straightforward and entirely consistent with *United States v. Agurs*. The court of appeals simply held:

> "Thus, when the Government has evidence in its files that serves to impeach a prosecution witness, and when, as here, a specific request for that evidence is made, then due process requires the government to disclose the evidence if, viewed prospectively, the witness incriminates the defendant at trial, and the impeaching evidence significantly impairs the incriminatory quality of the testimony. A new trial must be granted if this standard is violated and if, viewed retrospectively against the totality of the circumstances, the error is not harmless beyond a reasonable doubt." (32a) (footnote omitted).

Thus, the analysis of the court of appeals breaks down into two simple steps. The first step, to determine whether there has been a violation of the due process clause, consists of three simple questions: (1) Was there a specific request; (2) Did the request relate to a witness who incriminated the defendant; (3) Would the suppressed evidence have "significantly impair[ed] the incriminatory quality of the testimony." If a due process violation is established, the court must then determine, as it does with all other constitutional violations, whether the violation was "harmless beyond a reasonable doubt." Rather than being complicated and novel, the court of appeals' opinion simplifies the *Agurs* inquiry by breaking down the materiality determination into a series of separate analytical steps.

a. The government criticizes the court of appeals' analysis as a departure from *United States v. Agurs* and opinions following *Agurs*. To the contrary, the opinion is scrupulously faithful to *Agurs* and its progeny.

The first step of the court of appeals' analysis, determining whether the government violated the due process clause, is grounded specifically in the language of *Agurs:*

> "Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106.

The "substantial basis for claiming materiality" test applied by the court of appeals is, therefore, derived directly from *Agurs*. Moreover, it provides specific guidance for prosecutors in the future. "Materiality" is defined as "evidence which relates to a witness who provides incriminating testimony, the value of which would be *significantly* impaired by the impeaching evidence." (32a) (emphasis added). Thus, the first step of the court of appeals' analysis is not only faithful to, but derived directly from, *Agurs*.

Furthermore, the court of appeals' analysis is entirely consistent with precedent in the Third Circuit. In *United States v. McCrane*, 547 F.2d 204 (3d Cir. 1976), the Third Circuit considered the government's refusal to disclose exculpatory material in light of *Agurs*. The Third Circuit reversed the defendant's conviction and granted a new trial since "it is clear that there was a substantial basis for claiming that materiality existed. Consequently,

the United States Attorney should have produced the evidence."[3] *Id.* at 208 (footnote omitted).

b. The government also claims that the second step of the court of appeals' analysis, applying the harmless error standard, misconstrues *Agurs*. The government cites only two cases in support of this claim, neither of which supports the government's position. *See United States v. Farid*, 733 F.2d 1318, 1320-21 (8th Cir. 1984) (affirming district court's conclusion that information government intentionally failed to disclose would not have made difference where district court sat non-jury); *Zeigler v. Callahan*, 659 F.2d 254, 266-67 (1st Cir. 1981) (court applied "might have affected" test).

The government ignores other cases specifically applying the constitutional harmless error test or its equivalent in specific request cases. *See King v. Ponte*, 717 F.2d 635, 641-42 (1st Cir. 1983); *Chavis v. North Carolina*, 637 F.2d 213, 222 & 224 (4th Cir. 1980); *Monroe v. Blackburn*, 607 F.2d 148, 151 & n.5 (5th Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); *United States v. Goldberg*, 582 F.2d 483, 488 (9th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979); *Ostrer v. United States*, 577 F.2d 782, 786 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *United States v. DiCarlo*, 575 F.2d 952, 959 n.5 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978). In fact, the government's argument that different tests apply to the first and second situations discussed in *Agurs* was specifically rejected in *Ostrer v. United States*, 577 F.2d 782, 786 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Further, the law in the First Circuit relied upon by the government directly supports the Third Circuit's

3. The government touts the district court's application of the "reasonably likely" test as the correct analysis. (Pet. 10 n.5). However, the government fails to note that the district court relied on the pre-*Agurs* version of *United States v. McCrane*, 527 F.2d 906 (3d Cir. 1975), *vacated*, 427 U.S. 909 (1976). It is noteworthy that the district court neither mentioned the subsequent *McCrane* opinion, nor even listed it as subsequent history in the citation. (65a).

decision to apply the constitutional harmless error test in specific request cases. *Compare* Pet. 10 n.5 *with King v. Ponte*, 717 F.2d 635, 641-42 and cases cited therein (1st Cir. 1983). In short, the Third Circuit's application of the constitutional harmless error test in a specific request case is supported by every other court of appeals to address the issue except *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983), *cert. granted sub nom. United States v. Bagley*, ____U.S. ____, 105 S. Ct. 427 (1984) (No. 48, 1984 Term).

c. The government complained that the court of appeals based its opinion solely upon its desire to chastise the prosecutors for unnecessary gamesmanship in construing defense requests for exculpatory information. (Pet. 10). However, the government neglects to mention that the court of appeals specifically rejected the egregious conduct of the government as a reason to grant a new trial in this case. After discussing the inexplicable refusal of the government to provide the Wille immunity agreement, the court acknowledged that it was not "free to reconsider the wisdom of the gamesmanship encouraged by the *Agurs* materiality standards." (27a). Therefore, the court set about deciding whether "either defendant had a 'substantial basis for claiming materiality.' " *Id. quoting United States v. Agurs*, 427 U.S. at 106. Thus, the government is simply wrong in stating that the deliberateness of the prosecutor's suppression of exculpatory evidence played any part in the court of appeals' conclusion that a new trial was required in this case.

d. The government also criticizes the court of appeals for adopting an irrebutable presumption that "significantly impeaching evidence is always material." (Pet. at 9). The government's characterization of the court of appeals' opinion is correct insofar as it relates to a witness who provides incriminatory testimony, but the government implies that application of this standard will lead to a reversal in every case where a prosecutor fails to dis-

close impeachment material. The government fails to recognize two significant limitations on this test. First, mere impeaching evidence will not satisfy the materiality test. The evidence is only material if it "significantly impairs the incriminatory quality of the testimony." In this case, there was no question about the application of this standard since the evidence disclosed a specific immunity agreement with the government and Wille's involvement in an enormous check-kiting scheme. This evidence would have allowed the defendant to further argue that this prosecution consisted entirely of witnesses who were beholden to the government and for whom the government had paid a high price.

Second, the government's contention that the Third Circuit creates an irrebutable presumption of materiality ignores the application of the harmless error test. The application of this test does not guarantee reversal in every instance of the government's refusal to disclose significantly impeaching evidence. *See, e.g., King v. Ponte*, 717 F.2d 635, 641 (1st Cir. 1983). Therefore, if, as the government contends, the evidence relates solely to a witness providing cumulative testimony, the government's failure to disclose the evidence, although deliberate, will not result in a new trial.

Thus, the government ignores two significant limitations in the court of appeals' opinion which guarantee that a prosecutor's failure to disclose evidence in response to a specific request, no matter how deliberate and willful,[4] will not result in a new trial unless the court

4. *Brady* and other due process cases have stated that a defendant's right to a new trial should not depend upon the motivation of the prosecutor in failing to produce exculpatory evidence, but solely depend upon the impact the evidence would have had upon the outcome of the case. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This rule was designed to lessen the burden on a defendant seeking a new trial, since the harm to the defendant flows not from the deliberate nature of the conduct, but the failure to have the exculpatory evidence. *Id.* at 87-88. It is ironic now that the government seeks to justify its deliberate refusal to turn over obviously excul-

finds that the evidence would have significantly impaired the quality of the incriminatory testimony and that the error was not harmless beyond a reasonable doubt. In fact, the court of appeals expressly rejected application of a *per se* test. (35a).

e. The government's complains that the application of the court of appeals' "novel" approach in this case illustrates the problem inherent in that court's analysis. To the contrary, the court of appeals' analysis in this case demonstrates the wisdom of its approach. Rather than inviting the prosecution to withhold specifically requested evidence on the ground that it will later prove not to be material, the court's opinion sets forth specific guidelines for the prosecutor to follow in responding to a specific request. In this case, the prosecutor would have been alerted to the necessity of turning over the Wille immunity agreement before trial and the appeal, at least on this ground, would have been avoided.

Further, the court's careful analysis of whether this error was harmless beyond a reasonable doubt illustrates that not every violation of *Brady* in a specific request case will result in a new trial. The court only found that the error was not harmless because Wille "rebutted a principal defense on which Pflaumer relied," (38a), and that the immunity agreement could have been used to impeach Wille significantly. (40a & 43a-44a).

f. Finally, the government requests this Court to hold its petition for certiorari in this case and dispose of this case consistent with its decision in *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983), *cert. granted sub nom. United States v. Bagley*, ____U.S. ____, 105 S. Ct. 427 (1984) (No. 48, 1984 Term). The government's request ignores the fundamental difference between *Bagley* and this case. *Bagley* involved an automatic reversal. *Bagley* does not contain any of the substantial

---

patory evidence by hiding behind a standard that precludes inquiry into the wilfulness of the prosecutor's conduct.

limitations of this case — *i.e.*, the impeaching evidence must significantly impair the quality of the incriminatory testimony, and any error must not be harmless beyond a reasonable doubt. In fact, the Third Circuit, notwithstanding the government's inexplicable conduct, expressly rejected a *per se* rule of materiality or reversal. (35a).

The Third Circuit's opinion applies well-settled law announced by this Court in *Agurs* and followed by the Third Circuit in *McCrane*. It does not create new law or stretch the law in any way suggested by *Bagley*. Therefore, this Court should not hold the petition for certiorari in this case pending resolution of the *Bagley* case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Donald J. Goldberg
1310 Three Girard Plaza
Philadelphia, PA 19102

Joseph A. Tate
Stephen D. Brown
Ronald P. Schiller
SCHNADER, HARRISON,
SEGAL & LEWIS
Suite 3600,
1600 Market Street
Philadelphia, PA 19103

Of Counsel.

Attorneys for Respondent.